

Spotlight on *Speech Codes* **2012**

**THE STATE OF FREE SPEECH
ON OUR NATION'S CAMPUSES**



FIRE

FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION



- *Free speech and open debate are severely restricted at colleges and universities; the vast majority of American colleges and universities have speech codes.*
- *Of 392 schools surveyed, 65% maintain severely restrictive, “red light” speech codes.*
- *In Illinois, Louisiana, Mississippi, and Wisconsin, 100% of the schools surveyed received a red light.*
- *The percentage of schools with red light speech codes has declined for the fourth year in a row, down from 75% four years ago.*
- *The percentage of public schools with a red light rating also fell for a fourth consecutive year, from 79% four years ago to 65% this year—a dramatic change.*
- *Schools that eliminated all of their red light policies usually maintained other policies that were rated yellow light; overall, 29% of schools received a yellow light rating.*
- *Fourteen schools (3.6%) received FIRE’s highest, green light rating, up from eight schools (2%) four years ago.*
- *The best state for free speech in higher education was Virginia, where only 28.5% of the schools surveyed received a red light and 43% received a green light.*

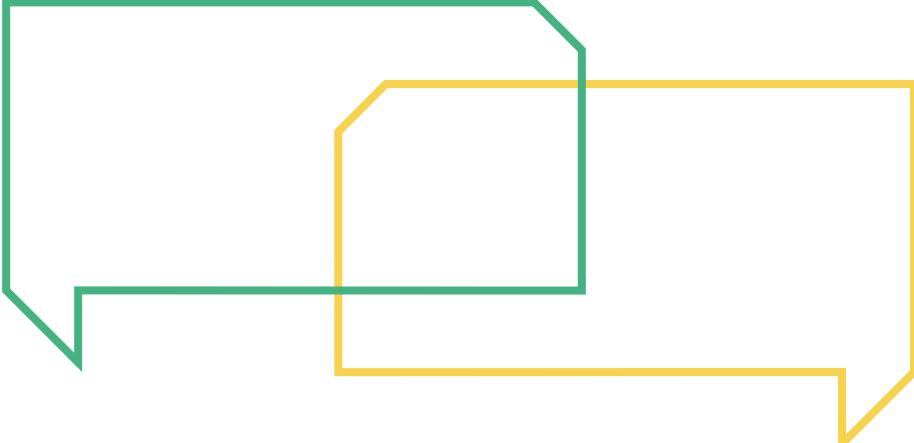


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Executive Summary

The U.S. Supreme Court has called America’s colleges and universities “vital centers for the Nation’s intellectual life,” but the reality today is that many of these institutions severely restrict free speech and open debate. Speech codes—policies prohibiting student and faculty speech that would, outside the bounds of campus, be protected by the First Amendment—have repeatedly been struck down by federal and state courts. Yet they persist, even in the very jurisdictions where they have been ruled unconstitutional; the majority of American colleges and universities have speech codes.

FIRE surveyed 392 schools for this report and found that 65% maintain severely restrictive speech codes—policies that clearly and substantially prohibit protected speech. That this figure is so large is deeply troubling, but there is a small silver lining: It represents a decline in the percentage of schools maintaining such policies for the fourth year in a row.

In another encouraging trend, several schools eliminated all of their restrictive speech codes this year, earning FIRE’s highest, “green light” rating.

The extent of colleges’ restrictions on free speech varies by state. In Illinois, Louisiana, Mississippi, and Wisconsin, 100% of the schools surveyed received a red light. In contrast, the best state for free speech in higher education was Virginia, where only 28.5% of the schools surveyed received a red light and 43% received a green light.

Unfortunately, progress is being threatened by new federal and state regulations on harassment and bullying. In an April 4, 2011, “Dear Colleague” letter to college and university presidents, the federal Department of Education’s Office for Civil Rights (OCR), which is responsible for enforcement of federal anti-discrimination laws on campus, appeared to back away from its previously robust support for students’ expressive rights. OCR’s letter extensively discusses universities’ obligations under Title IX to respond to claims of sexual harassment and sexual violence, establishing new mandates that can lead to a loss of federal funding if not met. The letter, however, fails to mention the First Amendment concerns inherent in the regulation of harassment, which OCR had previously addressed in a 2003 “Dear Colleague” letter. In addition to issuing the guidance, OCR has recently launched investigations of several universities for alleged Title IX violations. Given that the loss of federal funding would be a major blow for nearly all universities, OCR’s new focus on enforcement, combined with its apparent retreat from its earlier First Amendment concerns, may lead universities to punish clearly protected expression.



Azhar Majeed, Associate Director of Legal and Public Advocacy, and Robert Shibley, Senior Vice President.

Anti-bullying legislation, such as legislation recently adopted in the state of New Jersey and currently under consideration in the United States Congress, also raises serious free speech concerns for college students. Both the New Jersey law and the proposed federal legislation define “bullying” in a way that implicates protected speech, making it likely that universities in New Jersey and potentially nationwide will implement new policies infringing on students’ First Amendment rights.

Despite the clear trend towards fewer speech codes on campus over the past several years, there is reason to be profoundly concerned about new waves of campus censorship potentially facilitated by federal agencies and state and federal legislators.

Methodology

FIRE surveyed publicly available policies at 288 four-year public institutions and at 104 of the nation's largest and/or most prestigious private institutions. Our research focuses in particular on public universities because, as explained in detail below, public universities are *legally* bound to protect students' right to free speech.

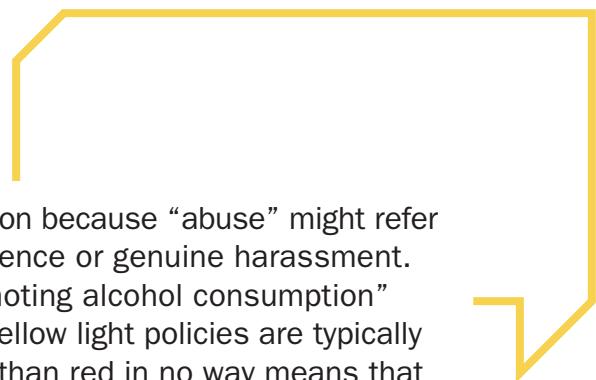
FIRE rates colleges and universities as "red light," "yellow light," or "green light" based on how much, if any, protected speech their written policies restrict. FIRE defines these terms as follows:

RED LIGHT A red light institution is one that has at least one policy both clearly and substantially restricting freedom of speech, or that bars public access to its speech-related policies by requiring a university login and password for access. A "clear" restriction is one that unambiguously infringes on protected expression. In other words, the threat to free speech at a red light institution is obvious on the face of the policy and does not depend on how the policy is applied. A "substantial" restriction on free speech is one that is broadly applicable to important categories of campus expression. For example, a ban on "offensive speech" would be a clear violation (in that it is unambiguous) as well as a substantial violation (in that it covers a great deal of what would be protected expression in the larger society). Such a policy would give a university a red light.

When a university restricts access to its speech-related policies by requiring a login and password, it denies prospective students and their parents the ability to weigh this crucial information. At FIRE, we consider this action by a university to be deceptive and serious enough that it alone warrants a red light rating. In this year's report, two institutions receive a red light rating for maintaining password protection on speech-related policies.¹

YELLOW LIGHT A yellow light institution maintains policies that could be interpreted to suppress protected speech or policies that, while clearly restricting freedom of speech, restrict only narrow categories of speech. For example, a policy banning "verbal abuse" has broad applicability and poses a substantial

¹ These are Connecticut College and Edinboro University of Pennsylvania.



threat to free speech, but it is not a clear violation because “abuse” might refer to unprotected speech, such as threats of violence or genuine harassment. Similarly, while a policy banning “posters promoting alcohol consumption” clearly restricts speech, it is limited in scope. Yellow light policies are typically unconstitutional,² and a rating of yellow rather than red in no way means that FIRE condones a university’s restrictions on speech. Rather, it means that in FIRE’s judgment, those restrictions do not clearly and substantially restrict speech in the manner necessary to warrant a red light.

GREEN LIGHT If FIRE finds that a university’s policies do not seriously threaten campus expression, that college or university receives a green light. A green light does not necessarily indicate that a school actively supports free expression; it simply means that the school’s *written* policies do not pose a serious threat to free speech.

NOT RATED When a private university³ expresses its own values by stating clearly and consistently that it holds a certain set of values above a commitment to freedom of speech, FIRE does not rate that university.⁴ Nine surveyed schools are listed as “not rated” in this report.⁵

2 For example, in 2004, the U.S. Court of Appeals for the Third Circuit found that a state law banning advertisers from paying to place advertisements for alcoholic beverages in university newspapers was unconstitutional. *Pitt News v. Pappert*, 379 F.3d 96 (3d Cir. 2004).

3 The “Not Rated” list also contains two public institutions, the U.S. Military Academy and the U.S. Naval Academy, both of which are among the nation’s top universities as named in *U.S. News & World Report*’s college rankings. Although these are public institutions, First Amendment protections do not apply in the military context as they do in civilian society. Rather, the U.S. Supreme Court has held:

The military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state by the First Amendment; to accomplish its mission the military must foster instinctive obedience, unity, commitment, and *esprit de corps*. The essence of military service “is the subordination of the desires and interests of the individual to the needs of the service.”

Goldman v. Weinberger, 475 U.S. 503, 507 (1986) (internal citations omitted). These institutions clearly and consistently do not promise their students full freedom of speech (the *West Point Catalog*, for example, explicitly states that “[m]ilitary life is fundamentally different from civilian life” and requires “numerous restrictions on personal behavior”) and, like private universities, are not legally obligated to do so.

4 For example, Vassar College makes it clear that students are not guaranteed robust free speech rights. Vassar’s policy on “Academic Freedom and Responsibility” explicitly states:

As a private institution, Vassar is a voluntary association of persons invited to membership on the understanding that they will respect the principles by which it is governed. Because Vassar is a residential college, and because it seeks diversity in its membership, individuals have a particular obligation beyond that of society at large to exercise self-restraint, tolerance for difference, and regard for the rights and sensitivities of others.

The policy further provides:

[M]embers of the college community accept constraints, similar to those of parliamentary debate against personal attacks or courts of law against the use of inflammatory language. Under the rule of civility, individuals within the community are expected to behave reasonably, use speech responsibly, and respect the rights of others.

“Academic Freedom and Responsibility,” *Vassar College Student Handbook*, available at <http://deanofthecollege.vassar.edu/documents/student-handbook/VassarStudentHandbook.pdf> (last visited Sep. 27, 2011). It would be clear to any reasonable person reading this policy that students are not entitled to unfettered free speech at Vassar.

5 FIRE has not rated the following schools: Baylor University, Brigham Young University, Pepperdine University, Saint Louis University, the U.S. Military Academy, the U.S. Naval Academy, Vassar College, Worcester Polytechnic Institute, and Yeshiva University. Bard College, which was not rated in previous years, chose this year to dramatically expand its stated commitments to free speech.

*Finding*s

Of the 392 schools reviewed by FIRE, 256 received a red light rating (65.3%), 113 received a yellow light rating (28.8%), and 14 received a green light rating (3.6%). FIRE did not rate nine schools (2.3%).⁶ (See Figure 1.)

For the fourth year in a row, this represents a decline in the percentage of schools maintaining red light speech codes, down from 75% four years ago.⁷ Additionally, the number of green light institutions has risen from just eight schools four years ago (2%) to 14 schools this year (3.6%).

The percentage of *public* schools with a red light rating also fell for a fourth consecutive year. Four years ago, 79% of public schools received a red light rating. This year, 65% of public schools did—a dramatic change. (See Figure 2.)

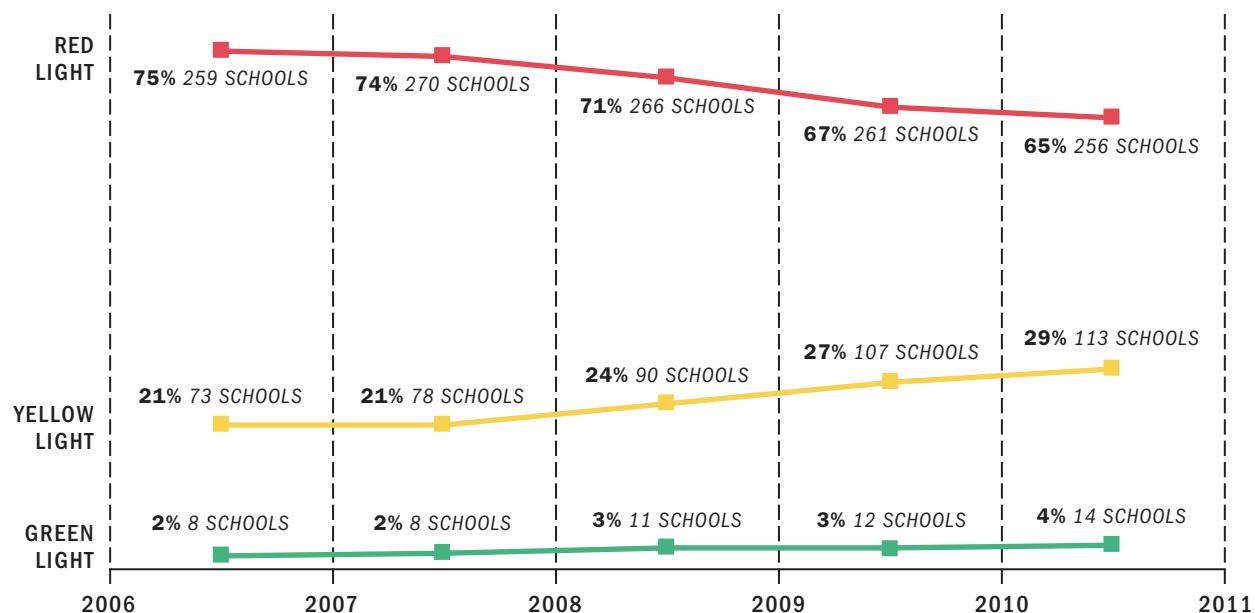


FIGURE 2: PUBLIC SCHOOLS BY RATING

6 See Appendix A for a full list of schools by rating.

7 The 2011 figure stood at 67%; in 2008, 2009, and 2010, it was 75%, 74%, and 71%, respectively. For a full list of rating changes since last year's report, see Appendix B.

FIRE rated 288 public colleges and universities. Of these, 65% received a red light rating, 30% received a yellow light rating, and 4% received a green light rating.⁸ Two schools—both military institutions (1%)—were not rated. (See Figure 3.)

Since public colleges and universities are legally bound to protect their students' First Amendment rights, any percentage above zero is unacceptable, so much work remains to be done. This ongoing positive trend, however, is encouraging. With continued efforts by free speech advocates on and off campus, this percentage likely will continue to drop.

The percentage of private universities earning a red light rating held steady this year at 65%. While private universities are not legally bound by the First Amendment, most make extensive promises of free speech to their students and faculty. Speech codes impermissibly violate those promises.

Of the 104 private colleges and universities reviewed, 65% received a red light rating, 25% received a yellow light rating, 3% received a green light rating, and 7% were not rated. (See Figure 4.)

The data showed a wide variation in restrictions on speech among the states.⁹ In Illinois, Louisiana, Mississippi, and Wisconsin, 100% of the schools FIRE surveyed received a red light. Georgia also fared poorly, with six out of seven schools surveyed (86%) receiving a red light. By contrast, only 28.5% of the schools surveyed in Virginia received a red light, and 43% received a green light. Virginia's success is a recent development: Over the past two years, three Virginia universities—The College of William & Mary, the University of Virginia, and James Madison University—eliminated all of their speech codes and earned a green

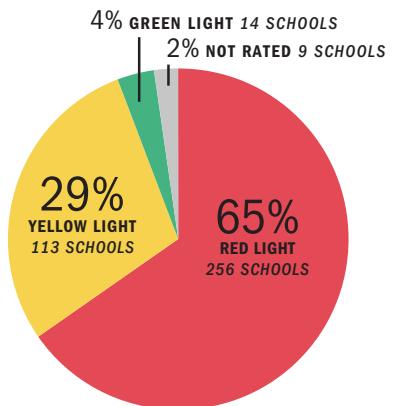


FIGURE 1: ALL SCHOOLS BY RATING, 2010–2011

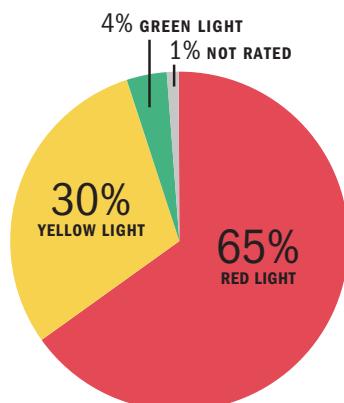


FIGURE 3: PUBLIC SCHOOLS BY RATING, 2010–2011

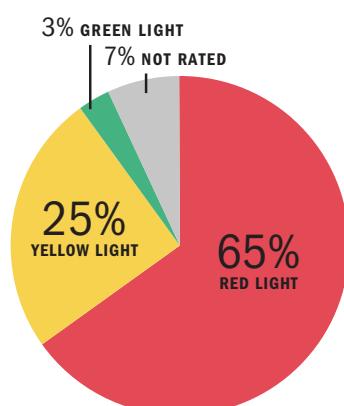


FIGURE 4: PRIVATE SCHOOLS BY RATING, 2010–2011

⁸ Joining the ranks of green light schools this year were Arizona State University and James Madison University.

⁹ State-by-state data are given in Appendix C for the 28 states in which FIRE has collected information on five or more universities.

light rating. The next best states for free speech in higher education were Maryland and Oklahoma, where 40% of schools surveyed were rated red light; North Carolina (42%); and Indiana (47%).

The U.S. Court of Appeals for the Third Circuit, whose jurisdiction includes Delaware, New Jersey, and Pennsylvania, has the strongest record in the nation of striking down university and even secondary school speech codes on constitutional grounds.¹⁰ One would expect, therefore, to see very few speech codes in the public universities of those states, but that is not the case. Delaware, for example, has two four-year public universities: the University of Delaware, which has a yellow light, and Delaware State University, which has a red light. In New Jersey, 57% of the public schools FIRE surveyed received a red light. Only Pennsylvania comes in below the 50% mark, with 47% of public institutions surveyed having red light ratings. Given the Third Circuit's unequivocal and robust support of students' free speech rights, the fact that these numbers do not come close to zero reflects the extent to which speech codes are deeply entrenched in the institutional culture of American colleges and universities.

FIRE's advocacy has successfully reversed the punishment of students like Isaac Rosenbloom (left) and Hayden Barnes (right), each of whom was disciplined for protected speech.



¹⁰ *McCauley v. University of the Virgin Islands*, 618 F.3d 232 (3d Cir. 2010); *DeJohn v. Temple University*, 537 F.3d 301 (3d Cir. 2008); *Saxe v. State College Area School District*, 240 F.3d 200 (3d Cir. 2001).

Discussion

Speech codes on campus: background and legal challenges

Speech codes—university regulations prohibiting expression that would be constitutionally protected in society at large—gained popularity with college administrators in the 1980s and 1990s. As discriminatory barriers to education declined, female and minority enrollment increased. Concerned that these changes would cause tension and that students who finally had full educational access would arrive at institutions only to be hurt and offended by other students, college administrators enacted speech codes.

In doing so, however, administrators ignored or did not fully consider the legal ramifications of placing such restrictions on speech, particularly at public universities. As a result, federal courts have overturned speech codes at numerous colleges and universities over the past two decades.

Despite the overwhelming weight of legal authority against speech codes,¹¹ the majority of institutions—including some of those that have been successfully sued—still maintain unconstitutional speech codes.¹² It is with this in mind that we turn to a more detailed discussion of the ways in which campus speech codes violate individual rights and what can be done to challenge them.

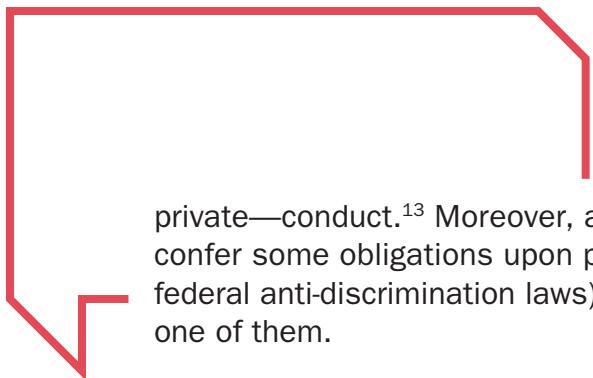
Public universities vs. private universities

The First Amendment prohibits the government—including governmental entities such as state universities—from interfering with the freedom of speech. A good rule of thumb is that if a state law would be declared unconstitutional for violating the First Amendment, a similar regulation at a state college or university is likewise unconstitutional.

The guarantees of the First Amendment generally do not apply to students at private colleges because the First Amendment regulates only government—not

¹¹ *McCauley v. University of the Virgin Islands*, 618 F.3d 232 (3d Cir. 2010); *DeJohn v. Temple University*, 537 F.3d 301 (3d Cir. 2008); *Dambrot v. Central Michigan University*, 55 F.3d 1177 (6th Cir. 1995); *Smith v. Tarrant County College District*, 694 F. Supp. 2d 610 (N.D. Tex. 2010); *College Republicans at San Francisco State University v. Reed*, 523 F. Supp. 2d 1005 (N.D. Cal. 2007); *Roberts v. Haragan*, 346 F. Supp. 2d 853 (N.D. Tex. 2004); *Bair v. Shippensburg University*, 280 F. Supp. 2d 357 (M.D. Pa. 2003); *Booher v. Northern Kentucky University Board of Regents*, No. 2:96-CV-135, 1998 U.S. Dist. LEXIS 11404 (E.D. Ky. July 21, 1998); *Corry v. Leland Stanford Junior University*, No. 740309 (Cal. Super. Ct. Feb. 27, 1995) (slip op.); *UWM Post, Inc. v. Board of Regents of the University of Wisconsin*, 774 F. Supp. 1163 (E.D. Wisc. 1991); *Doe v. University of Michigan*, 721 F. Supp. 852 (E.D. Mich. 1989). In addition, several institutions have voluntarily rescinded their speech codes as part of settlement agreements.

¹² Several universities that have been the target of successful speech code lawsuits—such as the University of Michigan and the University of Wisconsin—have revised the unconstitutional policies challenged in court but still maintain other, equally unconstitutional policies.



private—conduct.¹³ Moreover, although acceptance of federal funding does confer some obligations upon private colleges (such as compliance with federal anti-discrimination laws), compliance with the First Amendment is not one of them.

This does not mean, however, that students and faculty at private schools are not entitled to free expression. In fact, most private universities explicitly promise freedom of speech and academic freedom, presumably to attract the most talented students and faculty, since most people would not want to study or teach where they could not speak and write freely.

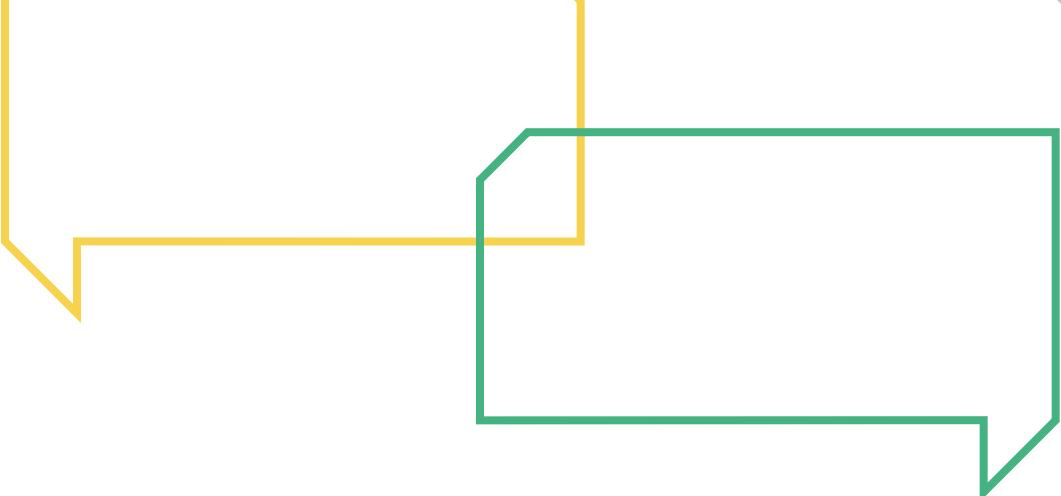
Yale University's Undergraduate Regulations, for example, provide that "Above all, every member of the university has an obligation to permit free expression in the university. No member has a right to prevent such expression. Every official of the university, moreover, has a special obligation to foster free expression and to ensure that it is not obstructed ... If expression may be prevented, censored or punished, because of its content or because of the motives attributed to those who promote it, then it is no longer free."¹⁴ Despite this promise, however, Yale has repeatedly disciplined or otherwise attempted to censor students for engaging in clearly protected expression. In May 2011, for example, Yale College Dean Mary Miller announced that the university's Delta Kappa Epsilon (DKE) fraternity was being suspended from the college for five years and that some DKE students had been found individually responsible for disciplinary violations because of an October 2010 incident in which DKE pledges stood blindfolded on campus satirically chanting "no means yes, yes means anal." Miller stated that DKE and the students were responsible for "harassment, coercion or intimidation" and "imperiling the integrity and values of the University community."

The pledges' satirical chant, while crude, would be entitled to constitutional protection in society at large. In the 1988 case of *Hustler Magazine v. Falwell*,

¹³ Although the First Amendment does not regulate private universities, this does not mean that all private universities are legally free to restrict their students' free speech rights. For example, California's "Leonard Law," CAL. EDUC. CODE § 94367, prohibits secular private colleges and universities in California from restricting speech that would otherwise be constitutionally protected. The Leonard Law provides, in relevant part:

No private postsecondary educational institution shall make or enforce any rule subjecting any student to disciplinary sanctions solely on the basis of conduct that is speech or other communication that, when engaged in outside the campus or facility of a private postsecondary institution, is protected from governmental restriction by the First Amendment to the United States Constitution or Section 2 of Article 1 of the California Constitution.

¹⁴ "Free Expression, Peaceful Dissent, and Demonstrations," Yale University Undergraduate Regulations, available at <http://yalecollege.yale.edu/content/free-expression-peaceful-dissent-and-demonstrations> (last visited Sep. 27, 2011).



485 U.S. 46 (1988), for example, the U.S. Supreme Court held unanimously that the First Amendment protected a satirical advertisement that portrayed the Reverend Jerry Falwell as having lost his virginity in a drunken encounter with his mother in an outhouse. In *Cohen v. California*, 403 U.S. 15 (1971), the Court ruled that a Vietnam War protester's jacket bearing the words "Fuck the Draft" was constitutionally protected expression even when worn in a courthouse. Taken together, these cases decisively and clearly protect offensive material, farce, profanity, and exaggeration and, in fact, even recognize that the "right to offend" serves a vital societal function.

At private universities, it is this false advertising—promising free speech and then, by policy and practice, prohibiting free speech—that is impermissible. Students may freely choose to enroll at a private institution where they knowingly give up some of their free speech rights in exchange for membership in the university community. But universities may not engage in a bait-and-switch where they advertise themselves as bastions of freedom and then instead deliver censorship and repression.

What exactly is “free speech,” and how do universities curtail it?

What does FIRE mean when we say that a university restricts “free speech”? Do people have the right to say absolutely anything, or are only certain types of speech “free”?

Simply put, the overwhelming majority of speech is protected by the First Amendment. Over the years, the Supreme Court has carved out some narrow exceptions: speech that incites reasonable people to immediate violence; so-called “fighting words” (face-to-face confrontations that lead to physical altercations); harassment; true threats and intimidation; obscenity; and defamation. If the speech in question does not fall within one of these exceptions, it most likely is protected speech.

The exceptions are often misused and abused by universities to punish constitutionally protected speech. These are instances where the written policy at issue may be constitutional—for example, a prohibition on “incitement”—but its application may not be. In other instances, a written policy will purport to be a legitimate ban on something like harassment or threats, but will, either



University of Wisconsin-Stout Professor Jim Miller was threatened with criminal charges for posting a quote from the television series Firefly outside his office.

deliberately or through poor drafting, encompass protected speech as well. Therefore, it is important to understand what these narrow exceptions to free speech actually mean in order to recognize when they are being misapplied.

THREATS & INTIMIDATION

The Supreme Court has defined “true threats” as only “those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.” *Virginia v. Black*, 538 U.S. 343, 359 (2003). The Court also has defined “intimidation,” in the constitutionally proscribable sense, as a “type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.” *Id.* at 360. Neither term would encompass, for example, a vaguely worded statement that is not directed at anyone in particular.

Nevertheless, particularly following the tragic 2007 shootings at Virginia Tech, universities have misapplied policies prohibiting threats and intimidation to infringe on protected speech.

In September 2011, for example, a professor at the University of Wisconsin-Stout was threatened with criminal charges and reported to the university’s “threat assessment team” for two satirical postings hung outside his office.



The first posting was a printout of a picture of the actor Nathan Fillion from the television series *Firefly*. The posting included a well-known line from an episode of the show: “You don’t know me, son, so let me explain this to you once: If I ever kill you, you’ll be awake. You’ll be facing me. And you’ll be armed.” Several days later, the professor was contacted by the university’s police chief, who notified him that she had removed the posting and that postings “that refer to killing” were unacceptable. In response, the professor posted a new flyer reading “Warning: Fascism,” with a mocking line at the bottom about the violence that may be caused by fascists: “Fascism can cause blunt head trauma and/or violent death. Keep fascism away from children and pets.” The poster also included a cartoon image of a police officer striking a civilian. University police removed that poster on the grounds that it “depicts violence and mentions violence and death,” and summoned the professor to a meeting about the posters because of concerns raised by the university’s threat assessment team.¹⁵

When questioned about the unlawful censorship, the university posted the following on its official Facebook page:

After consultation with the UW System Office of General Counsel, administrators determined that the posters displayed outside Professor Miller’s door constituted implied threats of violence, and they were removed.

The decision was made in the current context of tragedies on other university campuses, including those at Virginia Tech and Northern Illinois.¹⁶

Similarly, a university spokesperson told the *Eau Claire Leader-Telegram* that “[o]ur action has to be viewed in the context of post-Virginia Tech and post-Northern Illinois.”¹⁷ The university eventually reversed its decision to censor the posters, but only after FIRE launched a public campaign that generated national outrage over the case.

¹⁵ Letter from Adam Kissel, Vice President of Programs, FIRE, to Charles W. Sorensen, Chancellor, University of Wisconsin-Stout, Sep. 21, 2011, available at <http://thefire.org/article/13590.html> (last visited Sep. 27, 2011).

¹⁶ University of Wisconsin-Stout Official Site, <http://www.facebook.com/uwstout> (last visited Sep. 30, 2011).

¹⁷ Andrew Dowd, “UW-Stout professor claims free speech violated after posters removed,” *Eau Claire Leader-Telegram*, Sep. 29, 2011, available at http://www.twincities.com/ci_19002797 (last visited Oct. 4, 2011).

INCITEMENT

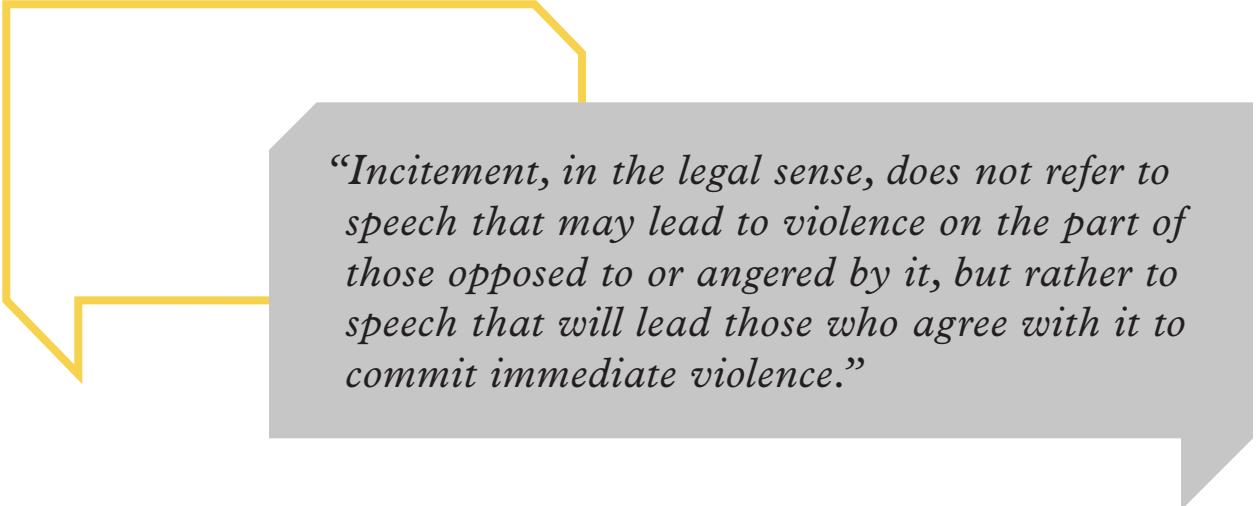
FIRE also has noticed an increased propensity among universities to restrict speech that deeply offends other students on the basis that it constitutes “incitement.” The basic concept, as administrators see it, is that offensive or provocative speech will anger those who disagree with it, perhaps so much that it moves them to violence. While preventing violence is an admirable goal, this is an impermissible misapplication of the incitement doctrine.

Incitement, in the legal sense, does not refer to speech that may lead to violence on the part of those opposed to or angered by it, but rather to speech that will lead those who *agree with it* to commit immediate violence. In other words, the danger is that certain speech will convince listeners who agree with it to take immediate unlawful action. To apply the doctrine to an opposing party’s reaction to speech is to convert the doctrine into an impermissible “heckler’s veto.” As the Supreme Court has said, speech cannot be prohibited because it “might offend a hostile mob” or be “unpopular with bottle throwers.”¹⁸

The precise standard for incitement to violence is found in the Supreme Court’s decision in *Brandenburg v. Ohio*, 395 U.S. 444 (1969). There, the Court held that the state may not “forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing *imminent* lawless action and is likely to incite or produce such action.” 395 U.S. at 447 (emphasis in original). This is an exacting standard, as evidenced by its application in subsequent cases.

For instance, the Supreme Court held in *Hess v. Indiana*, 414 U.S. 105 (1973), that a man who had loudly stated, “We’ll take the fucking street later” during an anti-war demonstration did not intend to incite or produce immediate lawless action (the Court found that “at worst, it amounted to nothing more than advocacy of illegal action at some indefinite future time”), and was therefore not guilty under a state disorderly conduct statute. *Id.* at 108–09. The fact that the Court ruled in favor of the speaker despite the use of such strong and unequivocal language underscores the narrow construction that has traditionally been given to the incitement doctrine and its requirements of likelihood and immediacy. Nonetheless, college administrations have been all too willing to ignore this jurisprudence.

¹⁸ *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992).



“Incitement, in the legal sense, does not refer to speech that may lead to violence on the part of those opposed to or angered by it, but rather to speech that will lead those who agree with it to commit immediate violence.”

OBSCENITY

The Supreme Court has held that obscene expression, to fall outside of the protection of the First Amendment, must “depict or describe sexual conduct” and must be “limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.” *Miller v. California*, 413 U.S. 15 (1973).

This is a narrow definition applicable only to some highly graphic sexual material; it does not encompass curse words, even though these are often colloquially referred to as “obscenities.” In fact, the Supreme Court has explicitly held that profanity is constitutionally protected. In *Cohen v. California*, 403 U.S. 15 (1971), the defendant, Cohen, was convicted in California for wearing a jacket bearing the words “Fuck the Draft” in a courthouse. The Court overturned Cohen’s conviction, holding that the message on his jacket, however vulgar, was protected speech. In *Papish v. Board of Curators of the University of Missouri*, 410 U.S. 667 (1973), the Supreme Court determined that a student newspaper article entitled “Motherfucker Acquitted” was constitutionally protected speech. The Court wrote that “the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of ‘conventions of decency.’” *Id.* at 670. Nonetheless, many colleges erroneously believe that they may legitimately prohibit profanity and other types of vulgar expression.

For example, Delaware State University’s Student Handbook provides that “students are expected to refrain from using four-letter words.”¹⁹ Angelo State University in Texas prohibits the use of “indecent, profane or vulgar language.”²⁰

¹⁹ “General Standards of Conduct,” *Delaware State University Student Handbook*, available at [http://www.desu.edu/sites/default/files/JudicialProcedures\(2\).pdf](http://www.desu.edu/sites/default/files/JudicialProcedures(2).pdf) (last visited Sep. 27, 2011).

²⁰ “Code of Conduct,” *Angelo State University Student Handbook*, available at http://www.angelo.edu/cstudent/documents/pdf/Student_Handbook.pdf (last visited Sep. 27, 2011).



*Adam Kissel,
Vice President of Programs.*

HARASSMENT

Actual harassment is not protected by the First Amendment. In the educational context, the Supreme Court has defined student-on-student harassment as conduct “so severe, pervasive, and objectively offensive that it effectively bars the victim’s access to an educational opportunity or benefit.” *Davis v. Monroe County Board of Education*, 526 U.S. 629, 633 (1999). This is conduct far beyond the dirty joke or “offensive” student newspaper op-ed that is too often deemed “harassment” on today’s college campus. Harassment is extreme and usually repetitive behavior—behavior so serious that it would interfere with a reasonable person’s ability to receive his or her education. For example, in *Davis*, the conduct found by the Court to be harassment was a months-long pattern of conduct including repeated attempts to touch the victim’s breasts and genitals together with repeated sexually explicit comments directed at and about the victim.

Universities are legally obligated to maintain policies and practices aimed at preventing this type of genuine harassment from happening on their campuses. Unfortunately, they often misuse this obligation by punishing protected speech that is absolutely *not* harassment. The misuse of harassment regulations became so widespread that in 2003, the federal Department of Education’s Office for Civil Rights (OCR)—the agency responsible for the enforcement of federal harassment regulations in schools—issued a letter of clarification to all of America’s colleges and universities.²¹ Then-Assistant Secretary of Education Gerald Reynolds wrote:

Some colleges and universities have interpreted OCR’s prohibition of “harassment” as encompassing all offensive speech regarding sex, disability, race or other classifications. Harassment, however, to be prohibited by the statutes within OCR’s jurisdiction, must include something beyond the mere expression of views, words, symbols or thoughts that some person finds offensive.

²¹ “Dear Colleague” Letter, July 28, 2003, available at <http://www.ed.gov/about/offices/list/ocr/firstamend.html> (last visited Sep. 27, 2011).



Reynolds wrote that “OCR’s regulations are not intended to restrict the exercise of any expressive activities protected under the U.S. Constitution” and concluded that “[t]here is no conflict between the civil rights laws that this Office enforces and the civil liberties guaranteed by the First Amendment.” Unfortunately, while Reynolds’ words still hold true, OCR’s April 4, 2011, “Dear Colleague” letter to universities seems to back away from the agency’s previously robust support for students’ free speech rights.²²

The April 4 letter discusses extensively the legal obligations borne by colleges and universities under Title IX to respond to both sexual harassment and sexual violence committed against students. However, it fails to mention the free expression concerns raised in the 2003 letter despite the fact that, as in 2003, a large number of institutions maintain harassment policies that violate students’ First Amendment rights.

Worryingly, the April 4 letter fails to replicate the exacting, speech-protective understandings of hostile environment sexual harassment contained in previous OCR guidance letters, including both the 2001 Guidance²³ and the 2003 “Dear Colleague” letter. In its 2001 Guidance, OCR explicitly noted that its understanding of hostile environment harassment was informed by the Supreme Court’s decision in *Davis*, whereas the April 4 letter contains no such statement.

OCR’s apparent retreat from its earlier concerns about students’ free speech rights is particularly troubling in light of the fact that hundreds of universities persist in maintaining overly broad definitions of harassment that include large amounts of constitutionally protected speech. Examples include:

- At Eastern Michigan University, sexual harassment includes any “inappropriate sexual or gender-based activities, comments or gestures.”²⁴
- At California State University–Chico, faculty members can face sexual harassment charges for “reinforcement of sexist stereotypes through subtle, often unintentional means” and even “continual use of generic masculine terms such as to refer to people of both sexes or references to both men and women as necessarily heterosexual.”²⁵

22 “Dear Colleague” Letter, April 4, 2011, available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html> (last visited Sep. 27, 2011).

23 Office for Civil Rights, “Revised Sexual Harassment Guidance,” Jan. 19, 2001, available at <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.html> (last visited Sep. 27, 2011).

24 “Sexual Misconduct/Sexual Harassment,” *Student Conduct Code and Judicial Structure*, available at http://www.emich.edu/policies/chapter8/8-1_policy.pdf (last visited Sep. 27, 2011).

25 “Sexual Harassment,” Office of Student Judicial Affairs, available at <http://www.csuchico.edu/sjd/harassment/sexual.shtml> (last visited Sep. 27, 2011).



Under New Jersey's Anti-Bullying Bill of Rights Act, students must appraise all of their fellow students' subjective individual sensitivities before engaging in controversial speech.

These examples, along with many others, demonstrate that colleges and universities often fail to limit themselves to the narrow definition of harassment that is outside the realm of constitutional protection. Instead, they expand the term to prohibit broad categories of speech that do not even *approach* actual harassment, despite many such policies having been struck down by federal courts.²⁶ These vague and overly broad harassment policies deprive students and faculty of their free speech rights.

Having discussed the most common ways in which universities misuse the narrow exceptions to free speech to prohibit protected expression, we now turn to the innumerable other types of university regulations that restrict free speech and expression on their face. Such restrictions are generally found in several distinct types of policies.

ANTI-BULLYING POLICIES

Over the past year, “bullying” has garnered a great deal of media attention, bringing pressure on legislators and school administrators—at both the K-12 and the college levels—to crack down even further on speech that causes emotional harm to other students. On October 26, 2010, OCR issued a letter on the topic of bullying, reminding educational institutions that they must address actionable harassment, but also that “[s]ome conduct alleged to be harassment may implicate the First Amendment rights to free speech or expression.”²⁷ For such situations, the letter refers readers back to the 2003 “Dear Colleague” letter stating that harassment is conduct that goes far beyond merely offensive speech and expression. However, because it is primarily focused on bullying in the K-12 setting, the letter also urges an *in loco parentis*²⁸ approach that is inappropriate in the college setting, where students overwhelmingly are adults.

26 See, e.g., *DeJohn v. Temple University*, 537 F.3d 301 (3d Cir. 2008) (holding that Temple University's former sexual harassment policy was unconstitutionally broad); *Doe v. University of Michigan*, 721 F. Supp. 852 (E.D. Mich. 1989) (holding that University of Michigan's discriminatory harassment policy was unconstitutionally broad); *Booher v. Northern Kentucky University Board of Regents*, 1998 U.S. Dist. LEXIS 11404 (E.D. Ky. Jul. 21, 1998) (holding that Northern Kentucky University's sexual harassment policy was unconstitutionally broad).

27 “Dear Colleague” Letter, Oct. 26, 2010, available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html> (last visited Sep. 27, 2011).

28 “In the place of parents.”



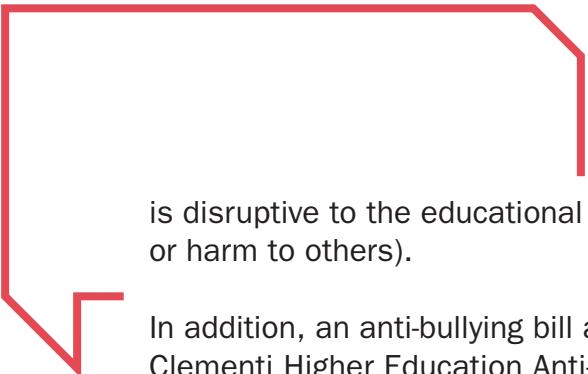
The same problem exists in New Jersey's Anti-Bullying Bill of Rights Act, which took effect on September 1, 2011.²⁹ In addition to addressing bullying at the K-12 level, the Act requires all of New Jersey's public colleges and universities to prohibit "harassment, intimidation and bullying," which it defines as:

[A] single incident or a series of incidents, that is reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic, that takes place on the property of the institution of higher education or at any function sponsored by the institution of higher education, that substantially disrupts or interferes with the orderly operation of the institution or the rights of other students and that:

- (a) a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student or damaging the student's property, or placing a student in reasonable fear of physical or emotional harm to his person or damage to his property;
- (b) has the effect of insulting or demeaning any student or group of students; or
- (c) creates a hostile educational environment for the student
- (d) by interfering with a student's education or by severely or pervasively causing physical or emotional harm to the student.

Under this definition, speech that does not rise to the level of actionable harassment (or any other type of unprotected speech) is now punishable as "bullying." Critically, the definition lacks any objective ("reasonable person") standard, and defines bullying conduct to include behavior that "has the effect of insulting or demeaning any student or group of students." As a result, students must appraise all of their fellow students' subjective individual sensitivities before engaging in controversial speech. While the Act does require that there be a "substantial disruption" to the educational environment, it places the onus squarely on the speaker to ensure that his or her speech will not cause another student, however sensitive or unreasonable, to react in a manner that

²⁹ N.J. Stat. § 18A:37-13.1 et seq. (2011), available at http://www.njleg.state.nj.us/2010/Bills/AL10/122_.PDF.



is disruptive to the educational environment (such as by engaging in self-harm or harm to others).

In addition, an anti-bullying bill aimed exclusively at college students, the Tyler Clementi Higher Education Anti-Harassment Act, was introduced in Congress in November 2010.³⁰ It failed to reach a vote before the end of the 111th Congress but was reintroduced in March 2011. Like New Jersey's anti-bullying law, the Clementi Act defines harassment without including any requirement of objective offensiveness, as required by the *Davis* standard: harassment under the Clementi Act is “conduct, including acts of verbal, nonverbal, or physical aggression, intimidation, or hostility … [that] is sufficiently severe, persistent, or pervasive so as to limit a student’s ability to participate in or benefit from a program or activity at an institution of higher education, or to create a hostile or abusive educational environment at an institution of higher education.”³¹

Universities have long argued, in defending overbroad harassment policies and other speech codes, that legal decisions regarding the free speech rights of students in the elementary and high school settings should apply in the college setting. The fact that legislators and even the U.S. Department of Education’s Office for Civil Rights now appear to be making the same argument when it comes to addressing “bullying” on campus is almost certain to lead to unconstitutional new restrictions on college students’ expressive rights in the coming years.

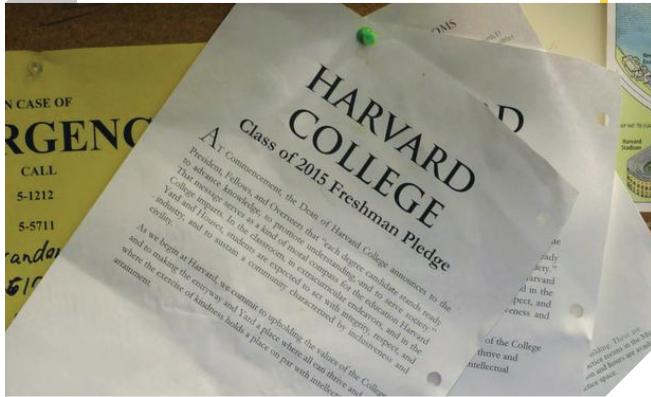
POLICIES ON TOLERANCE, RESPECT, AND CIVILITY

Many schools invoke laudable goals like respect and civility to justify policies that violate students’ free speech rights. While a university has every right to actively promote a tolerant and respectful atmosphere on campus, a university that claims to respect free speech must not limit speech to only the inoffensive and agreeable.

Here are just two examples of restrictive policies on tolerance, respect, and civility from the 2010–2011 academic year:

30 The suicide of Rutgers student Tyler Clementi, whose roommate surreptitiously videotaped and transmitted footage of Clementi engaged in sexual activity with another man, has led to much discussion of bullying on college campuses. It is critical to note, however, that the conduct that preceded Clementi’s suicide is already illegal; Clementi’s former roommate was indicted on 15 criminal counts, including invasion of privacy, and is currently on trial and facing prison time. Michael Winter, “N.J. Judge Rules Tyler Clementi’s Partner Must Be Identified,” *USA Today*, Sep. 9, 2011, available at <http://content.usatoday.com/communities/ondeadline/post/2011/09/nj-judge-rules-tyler-clementis-partner-must-be-identified/1?csp=34news>.

31 Tyler Clementi Higher Education Anti-Harassment Act of 2011, S. 540, available at <http://thomas.loc.gov/cgi-bin/query/z?c112:S.540>.



In September 2011, Harvard University pressured its incoming Class of 2015 to sign a civility oath.

- Governors State University's Civility Policy requires that "all members of the community must treat other members with civility and respect," specifying that "A university community member who has violated the policy is subject to disciplinary action, which may include separation of the offending party from the university."³²
- At North Carolina State University, students living in the residence halls must "speak to each other in a civil manner." Students are asked to report incidents of "incivility" to staff.³³

In September 2011, Harvard University drew controversy when it pressured its incoming Class of 2015 to sign an oath in which students pledge to conduct themselves with "civility," "inclusiveness," and "kindness." Although signing was not mandatory, the pressure to do so was significant enough that it infringed on students' freedoms of conscience and expression. Professor Harry Lewis, former Dean of Harvard College, described it in the following way:

The pledge is delivered to students for signing by their proctors, the officers of the College who monitor their compliance with Harvard rules and report their malfeasances to the College's disciplinary board. Nonconformists would have good reason to fear that they will be singled out for extra scrutiny. And their unsigned signature lines are hung for all to see, in an act of public shaming. Few students, in their first week at Harvard, would have the courage to refuse this invitation. I am not sure I would advise any student to do so.³⁴

32 "Civility Policy," *Governors State University Student Handbook*, available at http://www.govst.edu/uploadedFiles/student_handbook.pdf (last visited Sep. 16, 2011).

33 "Civility Statement," *North Carolina State University Housing*, available at <http://www.ncsu.edu/housing/civility.php> (last visited Sep. 16, 2011).

34 Harry Lewis, "The Freshman Pledge," <http://harry-lewis.blogspot.com/2011/08/freshman-pledge.html>.

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Syracuse University investigated student Len Audaer for his role in an explicitly satirical blog about life at Syracuse University College of Law.

While civility may seem morally uncontroversial, most “uncivil” speech is wholly protected by the First Amendment, and is indeed sometimes of great political and social significance. Colleges and universities may encourage civility, but public universities—and those private universities that purport to respect students’ fundamental free speech rights—may not require it.

INTERNET USAGE POLICIES

A great deal of student expression now takes place online, whether over email or on sites like Facebook and Twitter. Numerous universities maintain policies—many of which were originally written before the Internet became one of students’ primary methods of communication—severely restricting the content of online expression.

FIRE frequently finds universities with such policies punishing students or faculty members for constitutionally protected online speech. In October 2010, for example, Syracuse University began investigating a law student for the protected content of an explicitly satirical blog about life at Syracuse University College of Law (SUCOL). The blog included articles with titles like “Professors Pump Iron to Survive Apocalypse” and “Beer Bong Elected 2L President in Recall Election,” and it contained a clear disclaimer stating that it was satirical and that any references to actual people were not real.³⁵ Nonetheless, a SUCOL “faculty prosecutor” contacted student Len Audaer about the “extremely serious” charges against him, which the university pursued aggressively for months—

³⁵ SUCOL’s blog posts, available at <http://thefire.org/case/845.html>.



even threatening Audaer with expulsion—before finally dropping them in the face of intense public scrutiny.³⁶

A major part of the problem lies in Syracuse's speech codes. Syracuse's Computing and Electronic Communications Policy defines online "harassment" as, among other things, sending any "annoying" or "offensive" messages.³⁷

Examples of other impermissibly restrictive Internet usage policies in force during the 2010–2011 academic year include the following:

- Florida Gulf Coast University prohibits the use of email or "other Internet devices" for "racially or sexually charged messages, jokes or cartoons."³⁸
- Macalester College prohibits its students from posting anything on Facebook or Twitter that is "racially, sexually, ethnically or religiously objectionable."³⁹

POLICIES ON BIAS AND HATE SPEECH

In recent years, colleges and universities around the country have instituted policies and procedures specifically aimed at eliminating "bias" and "hate speech" on campus. These sets of policies and procedures, frequently termed "Bias Reporting Protocols" or "Bias Incident Protocols," often include speech codes prohibiting extensive amounts of protected expression. While speech or expression that is based on a speaker's prejudice may be offensive, it is entirely protected unless it rises to the level of unprotected speech (harassment, threats, etc.). The speaker's motive has no bearing on whether the speech is protected.

The protocols often also infringe on students' right to due process, allowing for anonymous reporting that denies students the right to confront their accusers. Moreover, universities are often heavily invested in these bias incident policies, having set up entire regulatory frameworks devoted solely to addressing them.

36 "Victory: Syracuse University Drops Allegations Against Student Blogger," FIRE Press Release, Feb. 2, 2011, available at <http://thefire.org/article/12818.html>.

37 "Computing and Electronic Communications Policy," available at <http://supolicies.syr.edu/it/computing.htm> (last visited Sep. 19, 2011).

38 "Email Policy," available at http://www.fgcu.edu/generalcounsel/files/policies/3_021_Email_Policy_09_03_09.pdf (last visited Sep. 19, 2011).

39 "Facebook (and other social networking)," *Macalester College Student Handbook*, available at <http://www.macalester.edu/studentaffairs/studenthandbook/campuspoliciesandprotocols/socialnetworking.html> (last visited Sep. 19, 2011).

“Universities may not regulate speakers and demonstrations on the basis of content or viewpoint.”

Here are some examples of bias incident policies in force during the 2010–2011 academic year:

- At Evergreen State College, “A bias incident is conduct, speech or expression that is motivated by bias based on perceived race, color, religion, ethnic/national origin, gender expression, sex, age, disability or sexual orientation identities but does not rise to the level of a crime.”⁴⁰
- At Clark University, a “hate incident” includes any act that has the “intent of hostility” toward another person based on, among other things, “social/political affiliation.”⁴¹

POLICIES GOVERNING SPEAKERS, DEMONSTRATIONS, AND RALLIES

Universities have a right to enact reasonable, narrowly tailored “time, place, and manner” restrictions that prevent demonstrations and speeches from unduly interfering with the educational process. They may not, however, regulate speakers and demonstrations on the basis of content or viewpoint, nor may they maintain regulations which burden substantially more speech than is necessary to maintain an environment conducive to education.

SECURITY FEE POLICIES

In recent years, FIRE has seen a number of colleges and universities attempt to discourage the invitation of controversial speakers by levying additional security costs on the sponsoring student organizations. This is a clear violation of the right to free speech: Any requirement that students or student organizations hosting controversial events pay for extra security is unconstitutional because it affixes a price tag to events on the basis of their expressive content.

The U.S. Supreme Court addressed this exact issue in *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992), when it struck down an ordinance in Georgia that permitted the local government to set varying fees for events based upon how much police protection the event would need. Criticizing the ordinance, the Court wrote that “[t]he fee assessed will depend on the administrator’s measure of the amount of hostility likely to be created by the

40 “Bias Incident Response Policy,” available at <http://www.evergreen.edu/policies/policy/biasincidentresponse-policy> (last visited Sep. 19, 2011).

41 “Hate Incidents,” *Clark University Student Handbook*, available at <http://www.clarku.edu/offices/dos/pdfs/undergraduatestudenthandbook.pdf> (last visited Sep. 19, 2011).

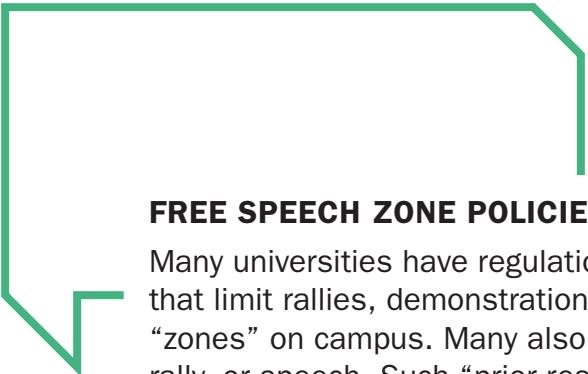


speech based on its content. Those wishing to express views unpopular with bottle throwers, for example, may have to pay more for their permit.” *Id.* at 134. Deciding that such a determination required county administrators to “examine the content of the message that is conveyed,” the Court wrote that “[I]listeners’ reaction to speech is not a content-neutral basis for regulation. **... Speech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob.**” *Id.* at 134–35 (emphasis added).

Despite the clarity of the law on this issue, the impermissible use of security fees to burden controversial speech is all too common on university campuses. Many universities maintain policies setting forth vague criteria by which security costs will be assessed, inviting this type of viewpoint discrimination. For example, the University of Oklahoma’s policy on event security states:

Student Life, in conjunction with the University of Oklahoma Chief of Police, or his or her designee, shall review security requirements for all events scheduled outdoors or in classroom facilities. When the director of Student Life determines that additional security beyond that normally provided is necessary, the director of Student Life shall so inform the [Registered Student Organization]. The RSO shall be responsible for the cost of additional security.”⁴²

⁴² “Facility Use and Solicitation Policy for Registered Student Organizations,” available at http://www.ou.edu/content/studentlife/get_involved/student_organizations/policies/jcr%3acontent/mid_par/download_0/file.res/Facility%20Use%20and%20Solicitation%20Policy%20for%20Registered%20Student%20Organizations090611.pdf (last visited Sep. 19, 2011).



FREE SPEECH ZONE POLICIES

Many universities have regulations creating “free speech zones”—regulations that limit rallies, demonstrations, and speeches to small or out-of-the-way “zones” on campus. Many also require advance notice of any demonstration, rally, or speech. Such “prior restraints” on speech are generally inconsistent with the First Amendment.

From a practical standpoint, it is easy to understand why such regulations are burdensome. Demonstrations and rallies are often spontaneous responses to recent or still-unfolding events. Requiring people to wait 48 or even 24 hours to hold such a demonstration may interfere with the demonstrators’ message by rendering it untimely and ineffective. Moreover, requiring demonstrators to obtain a permit from the university, without explicitly setting forth viewpoint-neutral criteria by which permit applications will be assessed, is an invitation to administrative abuse.

Despite legal precedent holding free speech zones unconstitutional, numerous schools persist in maintaining them. For example:

- Western Michigan University has established just one area called the “Free Speech Triad” for all “outdoor expression.” Individuals or groups wishing to use the Triad must register in advance with the student activities office, which appears to leave no option for spontaneous expressive activity.⁴³
- At Boston College, “applications for permits for all activities in the nature of a public speech, rally, demonstration, march, or protest must be submitted a minimum of 48 hours in advance to the Dean for Student Development. If approved, the activities must be conducted in accordance with the rules set forth below. The Dean reserves the right to determine the time and place of any public demonstration. Participation in a demonstration without prior authorization could result in disciplinary action.”⁴⁴

43 “Free Speech Triad,” *Western Michigan University RSO Handbook*, available at http://www.rso.wmich.edu/PDFs/RSO_Handbook.pdf (last visited Sep. 20, 2011).

44 “Student Demonstrations,” *Boston College Student Guide*, available at <http://www.bc.edu/publications/student-guide/behavioralpolicies.html#demonstration> (last visited Sep. 20, 2011).

What can be done?

The good news is that the types of restrictions discussed in this report can be defeated. Students themselves are a tremendously effective vehicle for change when they are aware of their rights and willing to engage administrators in defense of them. For example, student efforts were critical to the green light policy changes that took place at James Madison University, The College of William & Mary, and the University of Virginia over the past two years. At all of those institutions, students took their free speech concerns to the administration and worked productively with administrators to ensure that their universities' policies were revised in a way that protected their free speech rights.

Public exposure is also critical to defeating speech codes, since universities are usually unwilling to defend their speech codes in the face of public criticism.

Unconstitutional policies also can be defeated in court, especially at public universities. Speech codes have been struck down in federal courts across the country, including in California, Michigan, Pennsylvania, Texas, Wisconsin and, most recently, the U.S. Virgin Islands. Any red light policy in force at a public university is extremely vulnerable to a constitutional challenge. Moreover, as speech codes are consistently defeated in court, administrators are losing virtually any chance of credibly arguing that they are unaware of the law, which means that they can be held personally liable when they are responsible for their schools' violations of constitutional rights.⁴⁵

The suppression of free speech at American universities is a national scandal. But supporters of liberty should take heart: While many colleges and universities might seem at times to believe that they exist in a vacuum, the truth is that neither our nation's courts nor its citizens look favorably upon speech codes or other restrictions on basic freedoms.

⁴⁵ Azhar Majeed, *Putting Their Money Where Their Mouth Is: The Case for Denying Qualified Immunity to University Administrators for Violating Students' Speech Rights*, 8 CARDozo Pub. L. Pol'y & ETHICS J. 515 (2010).

Spotlight On:

THE DEPARTMENT OF EDUCATION'S OFFICE FOR CIVIL RIGHTS

The greatest threat to student rights on campus today comes not from the actions of individual universities, but from the federal government—specifically, the Office for Civil Rights (OCR) of the U.S. Department of Education. OCR is responsible for enforcing federal anti-discrimination laws in educational programs or activities that receive federal funding from the Department of Education. This includes every college that receives any federal funding, which is nearly all of them, since federal funding includes (among other things) the Stafford loans that so many students use to pay their tuition. If a school does not voluntarily comply with the federal laws and regulations that OCR enforces, OCR may formally find a school in violation and begin action to withdraw the school's Department of Education funding or ask the federal Department of Justice to begin judicial proceedings.

On April 4, 2011, OCR sent a guidance letter to all of the colleges and universities within its jurisdiction reminding them of their obligations under Title IX, the federal law prohibiting sex discrimination in federally funded educational programs. The letter discussed universities' existing requirements under Title IX and introduced new ones, two of which seriously jeopardize the due process rights of students accused of sexual harassment or sexual assault. While university judiciaries are not courts of law, students found responsible in university proceedings for what are widely understood to be serious offenses still face serious lifelong consequences, and as a result must be afforded certain basic due process measures.

The April 4 letter requires that in adjudicating cases of sexual harassment or sexual violence (but not other violent acts), campus judiciaries must utilize a “preponderance of the evidence” (more likely than not, or about 50.01% proof) evidentiary standard. This is the lowest evidentiary standard used in our judicial system. It is primarily used in civil cases (all criminal cases must use the much higher “beyond a reasonable doubt” standard), and as the courts have recognized, it does not sufficiently protect an accused person’s right to due process.

The letter also requires that if a school provides the accused with the right to an appeal, the accuser must have the same right. This requirement resembles “double jeopardy,” a situation in criminal law where someone is tried twice for the same crime. For reasons of fundamental fairness, our criminal justice system does not allow those accused of crimes to face double jeopardy—once acquitted of a crime, the case is over. Those same principles of fundamental fairness should apply to students facing serious charges in a university judiciary.

With regard to freedom of expression, the April 4 letter fails to explicitly acknowledge that colleges must uphold their students’ free speech rights. It also fails to recognize

the fact that truly harassing conduct (as defined by the law) is distinct from protected speech. Public universities may not violate First Amendment rights, and private universities must honor their promises of freedom of expression. Previous OCR letters on this subject were clear about this, but this most recent letter is not.

The reason this lack of clarity is so important is that many colleges already enforce vague and overly broad sexual harassment policies, and often confuse speech protected by the First Amendment with speech or conduct that is actually punishable as harassment. With its lack of guidance on this issue, OCR's April 4 letter compounds these problems.

In addition to issuing the April 4 guidance, OCR has also demonstrated a renewed focus on Title IX enforcement, exemplified by its recent opening of investigations at a number of major universities. This focus would be a good thing if not for the untenable restrictions on free speech and due process that OCR seems to believe are necessary for Title IX compliance. As things stand, however, the combination of the guidance and the increased likelihood of investigation are a dangerous combination for students' rights on campus, because the loss of federal funding would be catastrophic for most institutions.

Unwilling to risk losing federal funding, universities have responded quickly to the changes at OCR, to the serious detriment of students' free speech and due process rights. In May 2011, Yale suspended the Delta Kappa Epsilon (DKE) fraternity for five years for an October 2010 incident in which blindfolded DKE pledges engaged in crude chants. The suspension came seven months after the incident, but just weeks after OCR had issued the "Dear Colleague" letter and announced a Title IX investigation into Yale over this and a few similar incidents.

Also following the April 4 OCR letter, Stanford University lowered the standard of evidence from "beyond a reasonable doubt" to "preponderance of the evidence" in the middle of a student's sexual assault hearing process. The student subsequently was found guilty.

The challenges posed by the new OCR guidance are different from those usually encountered when trying to defend civil liberties on campus. Because schools will almost certainly not risk losing their federal funding, the arguments about constitutional rights and obligations that traditionally have convinced schools to uphold student rights are ineffective in the face of actual or threatened OCR investigations. So long as the April 4 guidance remains controlling, therefore, supporters of civil liberties on campus face an uphill battle with respect to the aspects of student free speech and due process rights discussed here.

Appendix A

SCHOOLS BY RATING

RED LIGHT

Adams State College
Alabama A&M University
Alabama State University
Alcorn State University
American University
Angelo State University
Appalachian State University
Arkansas State University
Armstrong Atlantic State University
Athens State University
Auburn University
Auburn University Montgomery
Barnard College
Bates College
Bemidji State University
Boston College
Boston University
Bowdoin College
Brandeis University
Bridgewater State University
Brooklyn College,
City University of New York
Brown University
Bryn Mawr College
Bucknell University
California Institute of Technology
California State University–Bakersfield
California State University–Chico
California State University–
Dominguez Hills
California State University–Fresno
California State University–Fullerton
California State University–Long Beach
California State University–Los Angeles
California State University–Monterey Bay
California State University–Sacramento
California State University–San Bernardino
California State University–Stanislaus
California University of Pennsylvania
Carleton College
Case Western Reserve University

Central Connecticut State University
Central Michigan University
Central Washington University
Centre College
Cheyney University of Pennsylvania
Chicago State University
Claremont McKenna College
Clark University
Colby College
Colgate University
College of the Holy Cross
Colorado College
Columbia University
Connecticut College
Cornell University
Davidson College
Delaware State University
Delta State University
DePauw University
Dickinson College
East Carolina University
East Stroudsburg
University of Pennsylvania
Eastern Kentucky University
Eastern Michigan University
Edinboro University of Pennsylvania
Emory University
Evergreen State College
Fitchburg State University
Florida Gulf Coast University
Florida International University
Florida State University
Fordham University
Fort Lewis College
Franklin & Marshall College
Frostburg State University
George Mason University
Georgetown University
Georgia Institute of Technology
Georgia State University
Gettysburg College

Governors State University
Grambling State University
Grand Valley State University
Harvard University
Howard University
Illinois State University
Indiana State University
Indiana University of Pennsylvania
Indiana University, Northwest
Indiana University, Southeast
Iowa State University
Jackson State University
Jacksonville State University
Johns Hopkins University
Kansas State University
Kean University
Kenyon College
Lafayette College
Lake Superior State University
Lehigh University
Lewis-Clark State College
Lincoln University
Louisiana State University–Baton Rouge
Macalester College
Mansfield University of Pennsylvania
Marquette University
Marshall University
Massachusetts College of Liberal Arts
McNeese State University
Mesa State College
Michigan State University
Michigan Technological University
Middle Tennessee State University
Middlebury College
Mississippi State University
Missouri State University
Missouri University of Science
and Technology
Montana State University–Bozeman
Montana Tech of the University
of Montana

Morehead State University
Mount Holyoke College
Murray State University
New York University
Nicholls State University
North Carolina Central University
North Carolina School of the Arts
North Dakota State University
Northeastern Illinois University
Northeastern University
Northern Arizona University
Northern Illinois University
Northern Kentucky University
Northwestern Oklahoma State University
Northwestern State University
Northwestern University
Oberlin College
Ohio University
Oregon State University
Princeton University
Purdue University
Rensselaer Polytechnic Institute
Rice University
Richard Stockton College of New Jersey
San Francisco State University
Sewanee, The University of the South
Smith College
Southeastern Louisiana University
Southern Illinois University at Carbondale
Southwest Minnesota State University
St. Olaf College
State University of New York–Albany
State University of New York–Brockport
State University of New York–Fredonia
State University of New York–New Paltz
State University of New York–
University at Buffalo
State University of New York College
of Environmental Science and Forestry
Stevens Institute of Technology
Stony Brook University

Swarthmore College
Syracuse University
Tennessee State University
Texas A&M University–College Station
Texas Southern University
Texas Tech University
Texas Woman’s University
The College of New Jersey
The Ohio State University
Trinity College
Troy University
Tufts University
Tulane University
Union College
University of Alabama
University of Alabama at Birmingham
University of Alaska Anchorage
University of Alaska Southeast
University of Arkansas–Fayetteville
University of California, Riverside
University of California, Irvine
University of California, San Diego
University of California, Santa Cruz
University of Central Arkansas
University of Chicago
University of Cincinnati
University of Connecticut
University of Florida
University of Georgia
University of Hawaii at Hilo
University of Houston
University of Idaho
University of Illinois at Chicago
University of Illinois at Springfield
University of Illinois at Urbana-Champaign
University of Iowa
University of Kansas
University of Louisville
University of Maine–Presque Isle
University of Massachusetts–Amherst
University of Massachusetts at Lowell
University of Miami

University of Michigan–Ann Arbor
University of Minnesota–Morris
University of Minnesota–Twin Cities
University of Mississippi
University of Missouri–Columbia
University of Missouri at St. Louis
University of Nevada, Las Vegas
University of Nevada, Reno
University of New Hampshire
University of New Mexico
University of New Orleans
University of North Carolina–Greensboro
University of North Dakota
University of North Texas
University of Northern Colorado
University of Northern Iowa
University of Notre Dame
University of Oregon
University of Richmond
University of South Alabama
University of South Carolina–Columbia
University of South Florida
University of Southern California
University of Southern Indiana
University of Southern Mississippi
University of Texas at Arlington
University of Texas at Austin
University of Texas at El Paso
University of Toledo
University of Tulsa
University of Washington
University of West Alabama
University of Wisconsin–Eau Claire
University of Wisconsin–Green Bay
University of Wisconsin–La Crosse
University of Wisconsin–Madison
University of Wisconsin–Oshkosh
University of Wyoming
Utah State University
Utah Valley University
Valdosta State University
Vanderbilt University

Wake Forest University
Washington State University
Washington University in St. Louis
Wayne State University
Wesleyan University
West Chester University of Pennsylvania
West Virginia University
Western Illinois University
Western Kentucky University
Western Michigan University
Western State College of Colorado
William Paterson University
Winston Salem State University
Worcester State University
Youngstown State University

YELLOW LIGHT

Amherst College
Ball State University
Bard College
Binghamton University,
State University of New York
Bloomsburg University of Pennsylvania
Bowling Green State University
California Polytechnic State University
California State University–East Bay
California State University–Northridge
California State University–San Marcos
Clarion University of Pennsylvania
Clemson University
Colorado School of Mines
Colorado State University
Dakota State University
Drexel University
Duke University
Eastern New Mexico University
Elizabeth City State University
Fayetteville State University
Florida Atlantic University
Framingham State University
Furman University
George Washington University

Grinnell College
Hamilton College
Harvey Mudd College
Haverford College
Henderson State University
Idaho State University
Indiana University–Bloomington
Indiana University–Kokomo
Indiana University–Purdue University
Columbus
Indiana University–Purdue University
Fort Wayne
Indiana University–Purdue University
Indianapolis
Indiana University South Bend
Indiana University East
Keene State College
Kentucky State University
Kutztown University of Pennsylvania
Lock Haven University of Pennsylvania
Massachusetts Institute of Technology
Metropolitan State University
Miami University of Ohio
Millersville University of Pennsylvania
Montclair State University
New Jersey Institute of Technology
North Carolina A&T State University
North Carolina State University–Raleigh
Northern Michigan University
Occidental College
Oklahoma State University–Stillwater
Pennsylvania State University–
University Park
Pitzer College
Pomona College
Reed College
Rhode Island College
Rogers State University
Rutgers University–New Brunswick
Saginaw Valley State University
Saint Cloud State University
San Diego State University

San Jose State University
Scripps College
Shawnee State University
Skidmore College
Slippery Rock University of Pennsylvania
South Dakota State University
Southern Methodist University
Stanford University
Temple University
The City College of New York
Towson University
University of Alabama in Huntsville
University of Alaska Fairbanks
University of Arizona
University of California, Berkeley
University of California, Davis
University of California, Los Angeles
University of California, Santa Barbara
University of Central Florida
University of Central Missouri
University of Colorado at Boulder
University of Delaware
University of Denver
University of Kentucky
University of Maine
University of Maryland–College Park
University of Massachusetts at Dartmouth
University of Montana
University of Montevallo
University of North Alabama
University of North Carolina–Asheville
University of North Carolina–Chapel Hill
University of North Carolina–Charlotte
University of North Carolina–Pembroke
University of North Carolina–Wilmington
University of Oklahoma
University of Pittsburgh
University of Rhode Island
University of Rochester
University of Southern Maine
University of Vermont
University of West Georgia

Virginia Polytechnic Institute and State University
Washington & Lee University
Wellesley College
Western Carolina University
Westfield State University
Whitman College
Wichita State University
Williams College
Yale University

GREEN LIGHT

Arizona State University
Black Hills State University
Carnegie Mellon University
Cleveland State University
Dartmouth College
James Madison University
Shippensburg University of Pennsylvania
The College of William & Mary
University of Nebraska–Lincoln
University of Pennsylvania
University of South Dakota
University of Tennessee–Knoxville
University of Utah
University of Virginia

NOT RATED

Worcester Polytechnic Institute
Vassar College
Baylor University
Brigham Young University
Saint Louis University
Yeshiva University
Pepperdine University
United States Military Academy
United States Naval Academy

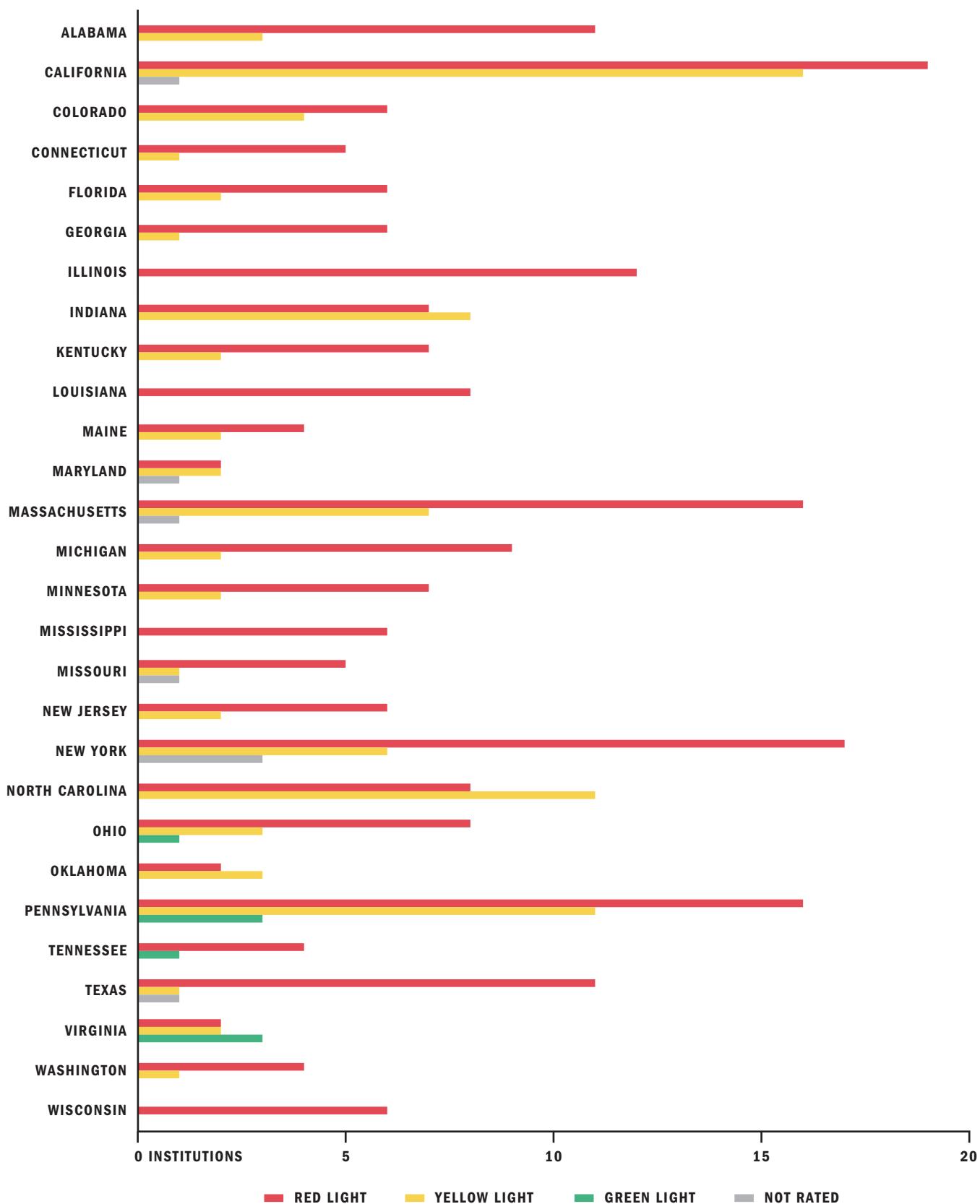
Appendix B

RATING CHANGES, 2010–2011 ACADEMIC YEAR

SCHOOL NAME	2009–2010 RATING	2010–2011 RATING
Alabama A&M University	YELLOW	RED
Arizona State University	YELLOW	GREEN
Athens State University	YELLOW	RED
Bard College	NOT RATED	YELLOW
Barnard College	YELLOW	RED
Bates College	YELLOW	RED
Bloomsburg University of Pennsylvania	RED	YELLOW
California State University–Bakersfield	YELLOW	RED
California State University–San Marcos	RED	YELLOW
Case Western Reserve University	YELLOW	RED
Chicago State University	YELLOW	RED
Clarion University of Pennsylvania	RED	YELLOW
Furman University	RED	YELLOW
Georgia State University	YELLOW	RED
Indiana University–Purdue University Indianapolis	RED	YELLOW
James Madison University	YELLOW	GREEN
Michigan State University	YELLOW	RED
Millersville University of Pennsylvania	RED	YELLOW
Rhode Island College	RED	YELLOW
Rutgers University–New Brunswick	RED	YELLOW
San Diego State University	RED	YELLOW
South Dakota State University	RED	YELLOW
Stanford University	RED	YELLOW
Texas Woman's University	YELLOW	RED
University of Arizona	RED	YELLOW
University of California, Davis	RED	YELLOW
University of North Alabama	RED	YELLOW
University of Rochester	RED	YELLOW

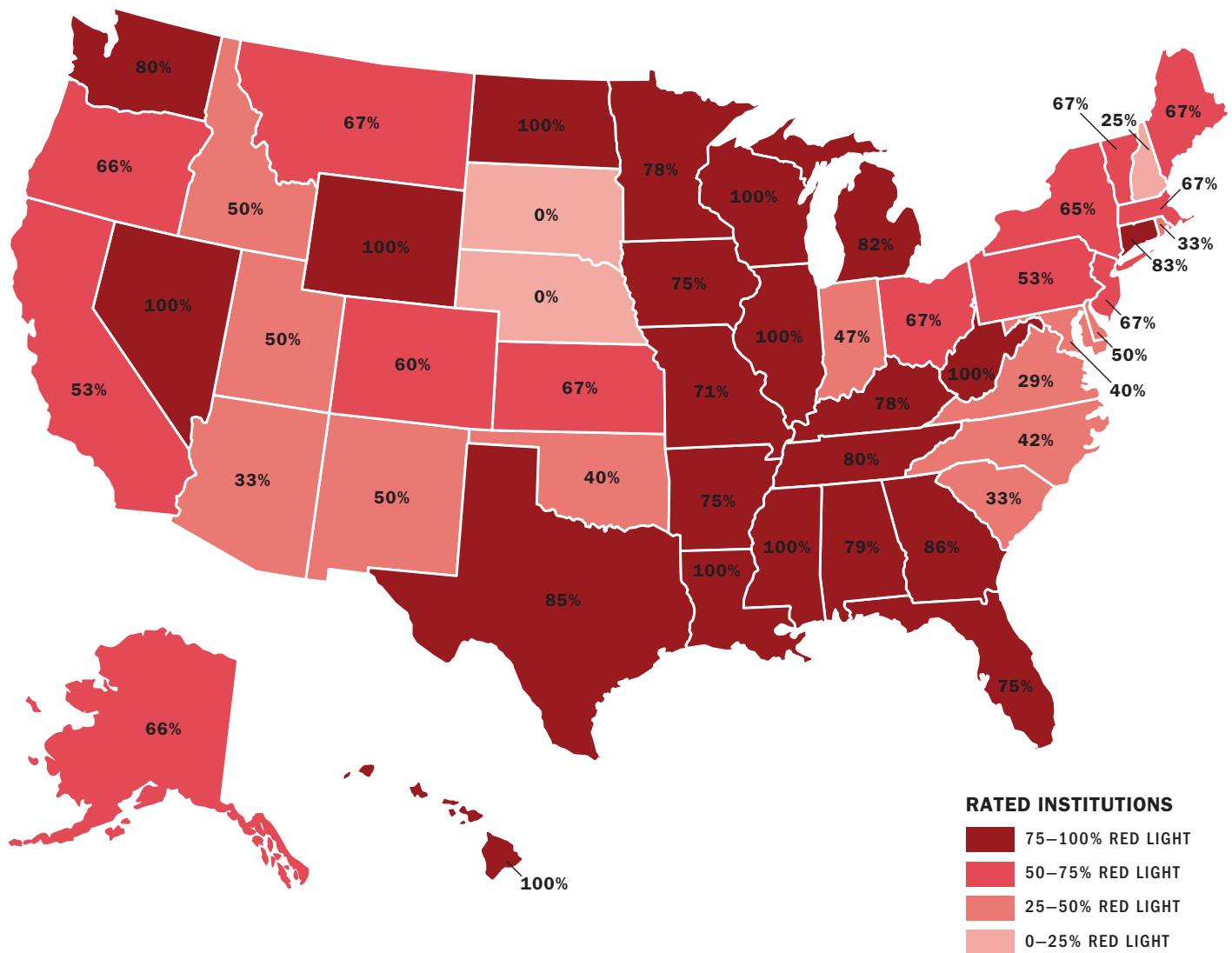
Appendix C

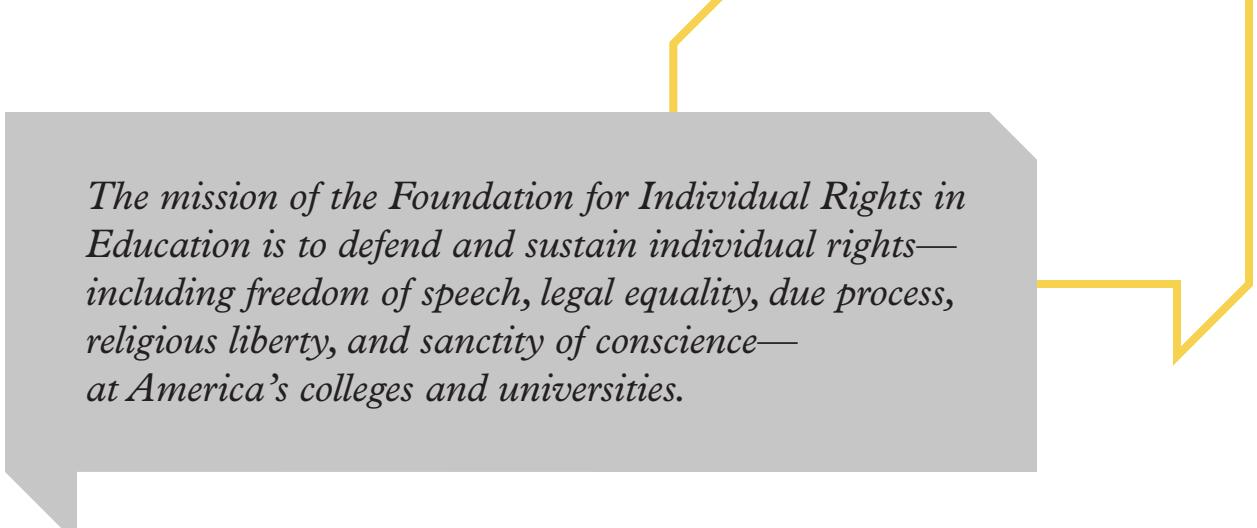
STATE-BY-STATE INFORMATION (MINIMUM FIVE INSTITUTIONS RANKED)



Appendix D

PERCENTAGE OF RED LIGHT INSTITUTIONS OF TOTAL INSTITUTIONS RANKED





The mission of the Foundation for Individual Rights in Education is to defend and sustain individual rights—including freedom of speech, legal equality, due process, religious liberty, and sanctity of conscience—at America’s colleges and universities.



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